

ABDUL MAJEED v. BOOR SINGH

[C.A. (Thomson C.J., Good J.A. & Azmi J.) October 25, 1961]

[Ipoh — F.M. Civil Appeal No. 19 of 1961]

Practice and Procedure — Appearance — Non-appearance by defendant — Liquidated claim — Need for affidavit evidence to support plaintiff's claim — Subordinate Courts Rules, 1950, O. 19 rr. 3 & 4.

The defendant was precluded from defending an action in the sessions court and judgment was given against him in the presence both of him and his counsel. On appeal to the High Court it was held that the defendant having appeared at the trial personally and by counsel the president should have proceeded to record evidence bearing in mind that he had made an order precluding the defendant from defending. From this decision the defendant appealed to the Court of Appeal. The plaintiff cross-appealed on the ground that the judge was wrong in holding that since the defendant had appeared at the hearing the president should have called on the plaintiff to prove his case and further that the judge was wrong in holding that the president had no power to enter judgment without hearing evidence.

Held, dismissing the appeal: it is wrong to construe O. 19 r. 3 of the Subordinate Courts Rules to mean that when a defendant does not appear and the claim is a liquidated one judgment may be entered forthwith for the plaintiff. Rule 3 and rule 4 must be read together in the case of non-appearance and where the claim is a liquidated one there must at the very least be some sort of affidavit evidence to support the plaintiff's claim.

COURT OF APPEAL.

P. P. Dharmananda for the appellant.

F. C. Arulanandom for the respondent.

In the court below the following judgment was delivered:

Neal J.: The appellant gave notice of appeal on 12th October, 1960, against the whole of the decision of the learned president of the sessions court Ipoh given on the 7th October, 1960, wherein the president exercising his discretionary power vested in him under Order 36 rule 7 and Order 10 rule 7 refused an application by the appellant in the following terms:

"I therefore pray for an order for extension of time to serve the statement of defence on the plaintiff or his solicitor."

and directed pursuant to Order 10 rule 7 of the Subordinate Courts Rules that the appellant be precluded from defending the claim. Pursuant to this the president entered according to the record what I can only describe as a judgment by default against the appellant.

In his memorandum of appeal pursuant to the notice of appeal to which I have referred the appellant limits his grounds of appeal in the following terms:

"...that is to say the appellant submits with respect that having regard to the circumstances of the case, and, in particular, the fact that, although out of time, the appellant did file a statement of defence which, the appellant submits, discloses a *prima facie* defence; the fact that such statement of defence was before the court at the time the order precluding the appellant from defending was made; the fact that such statement of defence was filed in court 9 days before the date fixed for the hearing of the case; the fact that the appellant had paid into court the sum of \$1,832.70 the amount claimed by the respondent; the fact that such sum was in court when the order precluding the appellant from defending was made; and having regard to the inherent powers of the court to make such orders as may be necessary to prevent injustice or to prevent abuse of the process of the court the learned president

A ought to have looked into the defence and ought to have heard the action and given judgment on the merits."

B Before me, in addition, counsel made it clear that he was not attacking the refusal of the court below to extend time. Nevertheless it forms part of the decision of the court below and since it appears doubtful whether it can properly be abandoned before me I propose to deal with it. The facts are perfectly clear and not in dispute. The appellant who is represented by counsel (not the counsel appearing before me) applied for on 5th August 1960 and obtained leave to file his statement of defence within two weeks. During the period intervening the plaintiff obtained leave to issue execution before judgment and the appellant deposited the amount of the alleged indebtedness in court. On the 7th October the appellant not having filed his statement of defence within the period fixed by the court made the application to which I have referred, obviously intended to be a further extension of time for filing his defence. He put forward by way of excuse that a solicitor not engaged by either of the parties in connection with his suit had stated to the appellant that the plaintiff had expressed his willingness to arrive at an amicable settlement of all his dealings with the appellant. In my opinion, the president was right in refusing to grant a further extension of time. Counsel, however, argued before me on the lines set out in his grounds of appeal. He relied upon the English authorities based upon the English Supreme Court Rules before their amendment. For myself, I find it unnecessary to deal with the question of the applicability of those rules since there is little similarity between the provisions of the Subordinate Courts Rules in the Federation and the original Supreme Court Rules in the United Kingdom. In my opinion the position is governed by Order 19 rule 3. I might add at this stage that this rule was not argued before me. The senior assistant registrar has drawn attention of counsel on both sides to its existence and to my view that it governs this particular appeal. In spite of the invitation neither counsel wished to address me further. By rule 3 the subordinate courts' jurisdiction to enter judgment by default is limited to those cases in which the defendant does not appear and where the claim is for a liquidated amount. From the record there can be no doubt that at the time judgment was entered the appellant and his then counsel were both present and there being nothing in the Subordinate Courts Rules which gives to the word, "appears," any particular special meaning there can be no doubt in my opinion that not only did the appellant appear at the hearing personally but he also appeared by counsel. That being so the president should have proceeded to record evidence bearing in mind that he had made an order precluding the defendant from defending. For that reason, in my opinion I am bound to allow the appeal and order a retrial.

I As to the procedure which is to be adopted on this particular retrial regard will have to be given to the fact that in his statement of defence filed out of time the defendant has alleged contravention of the Moneylenders Ordinance, 1951. Accordingly if in the evidence of the plaintiff there was evidence which satisfied the court pursuant to section 21 sub-section (2)

of the Moneylenders Ordinance then the court below would be bound to act under that sub-section. It is to be noted that under sub-section (3) of that section any court in which proceedings might have been taken, that is to say, the sessions court in this case, may at the instance of the borrower (the appellant in this case) re-open the transaction. This power does not seem to be limited by a judgment. As to whether the statement of defence filed by the appellant would comply in form with what is required under sub-section (3), I express no opinion. As far as I am aware no provision is made in the legislation or regulations made therein for any particular form but even if it did as I have said it is still open to the appellant at this stage to require an investigation under section 21 sub-section (3).

From the above decision the appellant appealed, and the respondent cross-appealed, to the Court of Appeal.

Thomson C.J.: This is an appeal from a decision of Mr. Justice Neal and there is also a cross-appeal.

The case commenced in the sessions court where the then plaintiff, the present respondent, commenced proceedings on a moneylender's note for the sum of \$1,769.70 with interest. That was, of course, a liquidated claim. The defendant, the present appellant, did not file any defence within the prescribed time. He was given an extension of time. He did not file his defence within the extended time and he ultimately did file a defence when he was out of time and when he had been refused any further extension.

The matter came on for hearing in the sessions court on 7th October, 1960. After some argument from counsel the learned president made an order under Order 10 rule 7 precluding the defendant from defending the claim. Thereafter no evidence was called of any sort and judgment was entered for the plaintiff as prayed.

Against that decision the defendant appealed and in the event Mr. Justice Neal, for reasons which I find it unnecessary to discuss beyond saying that I agree with them, made an order for a retrial. It is against that order that the defendant, rather curiously, has appealed and the respondent has cross-appealed.

It will be convenient, I think, to dispose of the cross-appeal first.

In my view, and I am not expressing disagreement with anything said by Mr. Justice Neal, it is sufficient in order to dispose of the cross-appeal to observe that there was no evidence called in support of the plaintiff's claim. Order 19 rule 3, as it now reads, is of course capable of bearing the construction that when a defendant does not appear, and the claim is a liquidated one, judgment may be entered forthwith for the plaintiff. But, although the rule is capable of that interpretation, it is quite clear that that is a wrong construction when it is read in the light of the next succeeding rule:

"In any action in which the defendant has not filed a defence or, having filed a defence, does not appear at the trial, the court may permit the plaintiff's case to be proved by evidence on affidavit:

A Provided that the court may, if it thinks fit, require the case to be proved by oral evidence, or require further evidence, oral or by affidavit, and may adjourn the trial for such purpose."

B It seems to me clear that reading the two rules together in the case of non-appearance and where the claim is a liquidated one there must at the very least be some sort of affidavit evidence to support the plaintiff's claim. There was no such evidence here and that, to my mind, disposes of the cross-appeal.

C Turning to the appeal, we have the extraordinary position that counsel has admitted that he has no complaint with the formal order obtained in the High Court. He would like, however, to have it, in the first place, amended and then restored to its original form because he thinks thereby to get rid of some expression of opinion by Mr. Justice Neal which he thinks might be regarded by the sessions court president who will preside at the new trial as prejudicing the issue.

D For myself I know of no authority which would support us in taking any such course and I am not disposed for myself to look for authority because I think the whole case for the appellant is based on a misapprehension.

E What happened in the sessions court was this. An order was made precluding the defendant from defending and immediately afterwards, apparently without any further argument, judgment was entered for the plaintiff. In the event the plaintiff extracted the order dated 7th October and the material portions of that order read:

F "It is ordered that the defendant be precluded from defending the claim and the defendant do pay to the plaintiff the sum of dollars one thousand seven hundred and sixty nine and cents seventy."

That was the order of the sessions court.

G The appellant's notice of appeal shows that he "appeals to the High Court at Ipoh against the whole" of that order and the order that was ultimately made by the High Court was to the effect that "the appeal is allowed" and the case was remitted to the sessions court.

In my view, as a matter of pleading, the effect of the High Court order is that not only is the judgment in favour of the plaintiff set aside but the order made under Order 10 rule 7 is also set aside.

H When the matter comes on for retrial it seems clear that it will be open to the plaintiff to ask for a fresh order to be made under Order 10 rule 7 and it will be open to the defendant to resist that application and it will be a matter for the president to decide.

I In view of some of the arguments we have listened to this morning I am reluctant to go any further, but I should point out that the purpose of rule 7 of Order 10 seems to me to ensure that the presiding officer in a subordinate court shall realise that he must exercise his discretion before deciding whether or not he should look at any defence that is not properly before him by reason of having been filed out of time. In that connection a number of cases to which we have been

referred this morning are very relevant and could suitably be mentioned in the lower court.

In all the circumstances then I would dismiss the appeal. I would dismiss the cross-appeal and would make no order as to costs.

Good J.A. and Azmi J. concurred.

Appeal and cross-appeal dismissed.

Solicitors: *Dharmananda & Co.; F. C. Arulanan-dom & Co.*

ANG CHIN SANG v. PUBLIC PROSECUTOR

[A.Cr.J. (Wee Chong Jin C.J. (Singapore)) January 28, 1968]

[Singapore — Magistrate's Appeal No. 216 of 1967]

Interpretation — Conflicting statutory provisions — Penal provision — Legislative intent — Fair construction according to — Preamble to Act.

Criminal Law and Procedure — Caning — Young person under age of sixteen — Children and Young Persons Ordinance (Cap. 128), s. 55(3) — Criminal Procedure Code (Cap. 132), s. 274 — Punishment for Vandalism Act, 1966, s. 3.

Section 3 of the Punishment for Vandalism Act, 1966, provides "Notwithstanding the provisions of any other written law, any person who commits an act of vandalism ... shall be guilty of an offence under this Act and shall be liable on conviction to a fine ... or to imprisonment ... and shall also, subject to the provisions of section 274 of the Criminal Procedure Code, be punished with caning with not less than three strokes and not more than eight strokes."

Section 55(3) of the Children and Young Persons Ordinance (Cap. 128) provides — "Notwithstanding the provisions of any other written law no child or young person shall be sentenced by any court other than the High Court to corporal punishment." "Young person" for the purpose of section 55 means a person who is under the age of sixteen years.

Section 274 of the Criminal Procedure Code provides that females, males sentenced to death, and males whom the court considers to be more than fifty years of age shall not be punishable with caning.

The appellant, a boy under sixteen years of age, was convicted by a magistrate's court for an offence punishable under section 3 of the Punishment for Vandalism Act, 1966 and was sentenced to three months' imprisonment and three strokes of the cane. He appealed on the ground that the magistrate's court had no power to impose the sentence of caning in view of section 55(3) of the Children and Young Persons Ordinance (Cap. 128).

Held, dismissing the appeal: (1) section 274 of the Criminal Procedure Code (Cap. 132) is a clear enactment of general application so that in respect of the three categories of persons mentioned therein no court whatsoever can sentence any of them to caning. Section 55(3) of the Children and Young Persons Ordinance (Cap. 128), however, is not of the same general application in that persons under the age of sixteen years can be sentenced to corporal punishment by the High Court;

(2) penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment. The legislative intent of the Punishment for Vandalism Act, 1966, is clear from the preamble which states that it is "An act to provide for exemplary punishment for acts of vandalism." The legislature by its express reference to section 274 of the Criminal Procedure Code (Cap. 132) intended to embrace all persons except the three categories specified therein, within the latter part of section 3, i.e. the punishment of caning. Therefore, the sentence of caning imposed was valid.

A MAGISTRATE'S CRIMINAL APPEAL.

T. T. Rajah for the appellant.

Toh Weng Cheong (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J.: This is an appeal against a sentence of caning imposed by a magistrate's court. The appellant was convicted of an offence punishable under section 3 of the Punishment for Vandalism Act, 1966 and was sentenced to three months' imprisonment and three strokes of the cane.

He now appeals against the sentence of caning on the ground that the sentence of caning by the magistrate's court is *ultra vires* the provisions of section 55(3) of the Children and Young Persons Ordinance (Cap. 128) as the appellant was under the age of 16 years at all material times.

It is contended that in so far as a person who is under the age of sixteen is concerned and who has committed an offence under section 3 of the Punishment for Vandalism Act 1966 the only court that can sentence him to caning under the mandatory provisions of that section is the High Court because of the provisions to section 55(3) of the Children and Young Persons Ordinance (Cap. 128).

That that is the correct contention is because, it is submitted, section 55(3) is a provision of law of general application in that the legislature has thought fit to limit the power to sentence a child or young person i.e. a person under the age of sixteen, to suffer corporal punishment to the High Court only and not to other courts.

The determination of the point raised in this appeal requires the consideration of the provisions of three sections of three Acts of the legislature namely, section 3 of the Punishment for Vandalism Act 1966, section 55(3) of the Children and Young Persons Ordinance (Cap. 128) and section 274 of the Criminal Procedure Code (Cap. 132). It is to be noted that the 1966 Act is the latest act promulgated by the legislature in point of time.

The material provisions of section 3 of the Punishment for Vandalism Act 1966 are as follows: —

"3. Notwithstanding the provisions of any other written law, any person who commits any act of vandalism or attempts to do any such act or causes any such act to be done shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding three years, and shall also, subject to the provisions of section 274 of the Criminal Procedure Code, be punished with caning with not less than three strokes and not more than eight strokes."

Section 55(3) of the Children and Young Persons Ordinance provides that: —

"Notwithstanding the provisions of any other written law no child or young person shall be sentenced by any court other than the High Court to corporal punishment."

"Young person" for the purpose of section 55 is defined to mean a person who is under the age of sixteen.

Section 274 of the Criminal Procedure Code provides —